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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * 78-6

NO. _____

* * *

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,

Appellants

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

VOLUME I

APPENDIX TO JURISDICTIONAL STATEMENT

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

On Appeal From The United States District Court For The Southern District Of Texas Houston Division

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APPENDIX A

MEMORANDUM OPINION OF THREE-JUDGE UNITED STATES DISTRICT COURT DATED: OCTOBER 12, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

UNITED STATES COURTHOUSE

HOUSTON, TEXAS 77002

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Mesdames and Gentlemen:

In re: C. A. 76-H-665
John Pleasant Sims, et al.
v. State Department of
Public Welfare, et al.

The court directs counsel for plaintiffs to prepare an appropriate final judgment consistent with the conclusions of this court as reflected in the attached memorandum opinion and to submit such judgment to the attorney general for approval as to form.

Very truly yours,

s/s
John V. Singleton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL.,	)(	
Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-665
STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS, ET AL.,	)(	
Defendants.	)(	
DOROTHY MAE WOODS, ET AL.,	)(	
Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-1120
RAUL JIMENEZ, ET AL.,	)(	
Defendants.	)(	

Before INGRAHAM, Circuit Judge, and
SINGLETON and STERLING, District Judges.
SINGLETON, District Judge:

This civil action is challenge to the constitutionality of portions of Chapters 11, 14, 15, 17, and 34, Title 2, TEXAS FAMILY CODE, seeking declaratory, injunctivonetary relief. The plaintiffs in the *Sims* case are two adult parents and their three minor children who seek relief from the actions of the Harris County Child Welfare Unit of the State Department of Public Welfare. Additionally, the case of *Woods v. Jimenez*,

Civil Action No. 76-H-1120, pending in this district, was consolidated with the *Sims* case solely on the issue of the right of indigent parents to counsel in suits for the termination of the parent-child relationship.

Pursuant to 28 U.S.C. §§ 2281, 2284, a three-judge district court was convened to determine the constitutional issues. The court has carefully considered the extensive briefs, the arguments of counsel, and the evidence presented and concludes that the case is properly before the court for determination, that certain portions of the Texas Family Code are violative of minimal constitutional standards, and that appropriate declaratory and injunctive relief is necessary.

The threshold issue is that of abstention in light of *Younger v. Harris*, 401 U.S. 37 (1971), *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice v. Vail*, ___ U.S. ___, 51 L.Ed.2d 376 (1977), and *Trainor v. Hernandez*, ___ U.S. ___, 52 L.Ed.2d 486 (1977). Having viewed the instant case with an eye to the notions of comity and federalism which underlie *Younger's* policy of equitable restraint, this court concludes that abstention is not warranted and would be improper under the unique and compelling circumstances of this case.

A chronology of the events which precipitated the filing of this suit is necessary. In March, 1976, the Sims children lived with their parents in Montgomery County, Texas, and attended the John G. Osborne Elementary School in the Houston Independent School District, located in Harris County, Texas. On March 25, 1976, the Harris County Child Welfare Unit received a telephone report from the school that Paul Sims was possibly the victim of child abuse. In response to that call, caseworker Rex Downing visited the school and, on the same date, took possession of the three Sims children

pursuant to Section 17.01 of Title 2 of the TEXAS FAMILY CODE.[1] The next day, March 26, the Child Welfare Unit instituted a "Suit for the Protection of a Child in an Emergency" pursuant to Chapter 17, which was filed in Juvenile Court Number One of Harris County, Texas, Cause No. 38,295, and concerned all three of the Sims children. Also on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court issued an ex parte order pursuant to Section 17.04, which has the effect of removing the children from the custody of their parents. Section 17.05 provides that such an order is of ten days in duration, and, upon the expiration of the order, the court is required to either order the restoration of the children to their parents or direct that a "Suit Affecting the Parent-Child Relationship" be filed.

On March 31, 1976, the plaintiff-parents sought to present to Judge Lowry a motion for modification of the March 26 Order, pursuant to Section 17.06. Although that section requires that a hearing be held on the motion, no hearing was in fact held. Rather, evidence before this court on May 5, 1976, indicates that the motion was not presented to Judge Lowry because of his temporary absence and was returned to counsel for the parents. Later on March 31, 1976, counsel for the parents filed with the Juvenile Court Number One, a petition for a writ of habeas corpus, Cause No. 1,069,341.

On April 5, 1976, a hearing was held before Judge Lowry on the parents' petition for a writ of habeas corpus. This was the first time since their seizure that the children were brought before the court for any hearing and the first time the parents were given any opportunity to appear. However, the merits of the dispute were never addressed. At the April 5 hearing, Judge Lowry determined that the children were residents of Montgomery County and, despite their

custody in Harris County, transferred the matter to Montgomery County. Later on April 5, at Judge Lowry's direction pursuant to Section 17.05(B) (2), the Harris County Child Welfare Unit filed a "Suit Affecting the Parent-Child Relationship" in *Harris* County. This second petition by the current defendants was filed in the same Cause No. 38,295 as the original emergency suit filed under Chapter 17. Finally, on April 5, 1976, Judge Lowry issued another ex parte temporary order pursuant to Section 11.11.[2] The order directed that the children continue in the possession of the Harris County Child Welfare Unit and purported to set a hearing upon its expiration. However, the order setting the hearing was entered in blank and to date the blanks have never been completed.

On April 6, 1976, the "Suit Affecting the Parent-Child Relationship" (Cause No. 38,295), which supplanted the emergency suit, and the habeas corpus action (Cause No. 1,069,341) were officially transferred to the District Court of Montgomery County and assigned to the docket of Judge Ernest A Coker, Sr. The transfer was apparently made *sua sponte* under Section 11.06(a) despite the requirement that it be transferred upon a timely motion.[3] It is stipulated that from April 6, 1976, to May 5, 1976, when the first hearing was conducted in this action, no notice, citation or process of any kind was served upon the plaintiff-parents with regard to the Montgomery County cases, nor were they afforded a hearing of any kind before the District Court of Montgomery County. During the entire time, the children remained in the custody of the Harris County Child Welfare Unit.

On April 19, 1976, the plaintiffs filed their Original Complaint in federal court. On May 4, 1976, the plaintiffs filed a motion for leave to file an original petition for a writ of habeas corpus with the Texas Court

of Civil Appeals for the 14th District, which was denied on the same date. The next day, the managing judge of the three-judge district court conducted an evidentiary hearing at which the court found that the children were not in the legal custody of the defendants because the ex parte temporary order under Chapter 17, dated March 26, and the ex parte order under Section 11.11, dated April 5, had both expired. The court ordered that the Sims children be returned to their parents, but did not enjoin the Department of Public Welfare from taking action under state law to properly establish a temporary conservatorship over the children. Therefore, on May 14, 1976, the Department of Public Welfare filed another "Suit Affecting the Parent-Child Relationship" in the Juvenile Court of Montgomery County. This action concerned Paul Sims only.

The Juvenile Court on May 14, 1976, established a temporary managing conservatorship for the child and set a hearing for May 21. On May 21, upon the motion of the plaintiffs, the managing judge of the three-judge panel temporarily enjoined the hearing in Montgomery County. Subsequently, after a hearing, the three-judge court extended the restraining order and enjoined any further state proceeding under the challenged statutes pending determination of the plaintiffs' constitutional challenges.

I. ABSTENTION ISSUE

As a preliminary matter, the parties are in dispute as to whether there is a pending state action. Although the Chapter 15 action filed on May 14, 1976, was obviously not pending on the date the federal action was instituted, the original "Suit Affecting the Parent-Child Relationship" which was filed on April 5, 1976, and transferred to Montgomery County from Harris County on April 6 was pending on April 19 and, along with the action filed on May 14, remains on the docket of the

District Court of Montgomery County. The plaintiffs' argument that there is no pending proceeding because the temporary orders have expired is therefore without merit. *See Steffel v. Thompson*, 415 U.S. 452 (1974); *Hicks v. Miranda*, 442 U.S. 332 (1975). Although, as we note *infra*, there is no pending state judicial proceeding with regard to some aspects of the plaintiffs complaint, abstention must still be addressed because of the proceeding filed on April 5, 1976.

The extent to which *Younger* principles apply to a case where the pending state action is civil in nature is still unclear. The first acknowledged extension of *Younger* to civil cases involved a nuisance proceeding which was "more akin to a criminal prosecution than are most civil cases." *Huffman v. Pursue, LTD., supra* at 604. However, more recently, in *Juidice v. Vail*, ___U.S.___, 51 L.Ed.2d 376 (1977), and in *Trainor v. Hernandez*, ___U.S.___, 52 L.Ed.2d 486 (1977), the Supreme Court extended the coverage of *Younger* to an even broader range of civil cases. In each of the two most recent decisions, the court has reserved the issue of whether *Younger* principles apply to all civil cases. We believe that the facts of the instant case do not require abstention and, moreover, the nature of the constitutional challenge lodged against the questioned statutory scheme presents a compelling reason for this court to serve as the "primary and powerful" source for vindication of federally protected constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974).

In *Huffman* the Court emphasized that the fact that the state's criminal process was not involved was not determinative. Rather, a federal court considering an injunction against a pending state proceeding must carefully weigh the notions of comity and federalism and allow the state to effectuate its own policies through "a forum competent to vindicate any constitutional

objections interposed against those policies." *Huffman v. Pursue, Ltd.*, 420 U.S. at 604 (1975). The plaintiff in *Huffman* sought an injunction against the execution of a judgment entered in a pending nuisance action brought by the State of Ohio. Because such a federal injunction would disrupt "that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws," abstention was required. 420 U.S. at 605. The Court, therefore, extended the *Younger* policies of nonintervention to civil cases where the Court could find that a federal injunction would be "an offense to the State's interest... every bit as great as it would be were this a criminal proceeding." 420 U.S. at 604. It was at this early stage of the evolution of *Younger* to civil cases, that this court issued its preliminary injunction on June 18, 1976.

Since *Huffman*, this court has received the Supreme Court's guidance in *Juidice* and in *Trainor*, both expanding the original narrow application to civil cases in a manner requiring this court to carefully reflect on its judicial responsibilities with respect to the vindication of these plaintiffs' constitutional rights.

In *Judice v. Vail, supra*, *Younger* principles were held to prevent a federal court from enjoining a state judicial contempt proceeding on the basis of the weight to be given "a State's interest in contempt proceeding, through which it vindicates the regular operation of its judicial system." ___ U.S. at ___, 51 L.Ed.2d at 384. Acknowledging that such an interest is perhaps "not quite as important as is the State's interest in the enforcement of its criminal laws, ... or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*," the Court labeled the interest in contempt proceedings as "of sufficiently great import." ___ U.S. at ___ 51 L.Ed.2d at 384. In

finding that "the contempt power lies at the core of the administration of a State's judicial system," ___ U.S. at ___, 51 L.Ed.2d at 384, the Court continued to concern itself with a pending state action which, like a criminal prosecution or nuisance proceeding, was unique to the governmental role of a state.

In *Trainor v. Hernandez, supra*, the Court appears to have expanded the types of state civil proceedings requiring the application of *Younger* principles. In *Trainor* the State of Illinois brought a civil action against the appellees seeking a return of welfare payments alleged to have been wrongfully received and sought a writ of attachment. The three-judge court enjoined the attachment and declared the Illinois Attachment Act to be unconstitutional. In remanding to the lower court for consideration of whether the attachment statute provides a debtor with a proper forum for his constitutional challenge, the Supreme Court noted that the principles of *Younger* and *Huffman* apply to injunctions against actions "brought by the State in its sovereign capacity," ___ U.S., ___, 52 L.Ed.2d at 496, rejecting the argument that attchement was not a remedy unique to the state and emphasizing, instead, that the state was a party to the attachment in its underlying role of administering public assistance programs. The Court concluded that a federal injunction's "disruption of suits by the State in its sovereign capacity, when combined with a negative reflection on the State's ability to adjudicate federal claims" dictated abstention unless "extraordinary circumstances were present." ___ U.S. at ___, 52 L.Ed.2d at 497.

It is in this legal and factual setting that this court decides that *Younger* and its progeny do not require application of their principles to the current dispute between these plaintiffs and the State of Texas.

Although *Juidice* and *Trainor* have expanded the types of civil cases to which *Younger* extends, it is clear that neither decision purports to apply *Younger* principles to all civil litigation between a state and its citizens. *Juidice*, ___U.S. at___, 51 L.Ed.2d 385 n. 13 (1977); *Trainor*, ___U.S. at ___, 52 L.Ed.2d at 496 n.8 (1977). From this we conclude that because of the wide range of interests and circumstances that could conceivably be present in a civil dispute, the proper role of a federal court is to carefully analyze each dispute individually with an equitable view toward the principles of comity and federalism and a careful study of the state action involved.[4] This court considers the *Younger* principles inapplicable here for two reasons: the nature of the state action and the nature of the plaintiff's challenge.

First, the action taken by the State of Texas against the plaintiffs is multifaceted. Unlike a criminal prosecution, or a nuisance, contempt, or attachment proceeding, there is no single state proceeding to which the plaintiffs may look for relief on constitutional or any other grounds. Many of the challenged actions taken by the state do not and will not involve any judicial proceeding.[5] Certainly as to these, there is no pending state civil litigation about which even to consider abstention. The only pending state suit is the one pending in Montgomery County, filed on April 5, 1976. Because the dispute between the plaintiffs and the State of Texas concerns more than a single state judicial action to which plaintiffs could raise a constitutional defense, *Younger* principles are inapplicable. *See Younger*, 401 U.S. at 46 (1971). The entire statutory scheme by which Texas attempts to deal with the problem of child abuse has been challenged and should be viewed as an integrated whole. This court will not consider part of the scheme and abstain from another part. To do so would seriously jeopardize any hope for an

effective statutory scheme and, in the name of comity and federalism, do violence to the state functions those principles seek to protect.

As a second independent basis for the inapplicability of *Younger* principles, we note that the plaintiffs' constitutional challenge is directed primiarily at the legality of the children's seizure and detention for a 42-day period without a hearing. It is clear that because this issue cannot be raised as a defense in the normal course of the pending judicial proceeding, adstention would be inappropriate. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9 (1975). The denial of custody of the children pending any hearing regardless of the result of the hearing, is in itself sufficient to prevent the application of *Younger*. *Cf. Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), *aff'd* 414 U.S. 1139 (1974).

Even if the nature of the state action and the constitutional challenge were such as to require the application of *Younger* principles, it is clear that there exists here circumstances where, even though the principles are otherwise applicable, a federal court should not abstain. Certainly, the threatened injury to the plaintiffs is both great and immediate. As we note *infra* the constitutional issues raised by the plaintiffs reach the application of due process in an area of the greatest importance to our society, the family. The constitutional infirmities recognized by this court, if uncorrected, would cause an injury to these plaintiffs far greater than a deprivation of a mere property interest. Furthermore, it has been recognized that where, as here, the plaintiff may not raise all of his constitutional claims as a defense in a *single* state proceeding, the necessary irreparability is present. *Younger v. Harris*, 401 U.S. at 46 (1971). When reviewing a statute permitting the North Carolina

authorities to take custody of children without a hearing under certain circumstances, the court in *Newton v. Burgin, supra*, observed that "the deprivation of custody prior to the civil proceeding is an irreparable injury which is both great and immediate . . . and . . . will not be dissipated in the state proceeding."

Of course, we realize that the mere facial invalidity of a statute does not in itself justify federal interference. *Younger v. Harris*, 401 U.S. at 54 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. at 602 (1975). While it is clear that intervention is warranted where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph," *Watson v. Buck*, 313 U.S. 387, 402 (1941), such a finding is not the only justification for federal action. In *Younger* the Court explained:

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the Buch case, supra, we indicated:
>
> > It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. 313 U.S. at 402.
>
> Other unusual situations calling for federal intervention may also arise, but there is no point in our attempting now to specify what they might be.

401 U.S. at 53-54.

In addition to this court's finding, *infra*, that several sections of the TEXAS FAMILY CODE are "flagrantly and patently" violative of federal constitutional requirements, the "unusual" circumstances referred to in *Younger* are present here and compel this court to grant equitable relief. Recognizing that more than a "highly unusual factual situation" must be present, *Trainor v. Hernandez*, ___ U.S. at ___, 52 L.Ed.2d at 494-95 n. 7 (1977), we find the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time to be such as to justify federal equitable relief even if *Younger* principles did apply.

As a general expression of the extraordinary and compelling circumstances present here, this court finds an absence for these plaintiffs of "an opportunity to fairly pursue their constitutional claims in an ongoing state proceeding." *Juidice*, ___ U.S. at ___, 51 L.Ed.2d at 396 (1977) citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).[6] Unlike the plaintiff in *Juidice*, the *Sims* plaintiffs have not failed to avail themselves of any opportunities in the state procedures. Despite serious constitutional objections to its burden-of-proof requirement, the plaintiffs sought a modification of the original ex parte order pursuant to Section 17.06. Although mandated by the statute, no hearing was afforded them. Plaintiffs also sought to raise their objections in an application for a writ of habeas corpus, but, when they were prepared to seize this opportunity to be heard, the matter was transferred to Montgomery County, and, despite the parents' presence in court earlier that day, the court issued another ex parte custody order and set a hearing in Montgomery County for an uncertain time in the future. Certainly, such efforts to earn an opportunity to be heard are more than sufficient before seeking relief in federal court on April 19, 1976.

The plaintiffs' having sought through diligent efforts an opportunity to be heard in a state proceeding, this court must conclude that whatever opportunities exist for them are not such as to allow them to "fairly pursue" their constitutional objections. In reaching such a conclusion, we are mindful that "[t]he policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), quoted in *Trainor*, ___ U.S. at ___, 52 L.Ed.2d at 494 (1977). Analogized to a civil dispute, no such premise can be found here. This court has already chronicled the attempts by the plaintiffs to receive any hearing in state court. The plaintiff-parents were separated from their children for a period of 42 days without a hearing--a period ended only by an order of this court. The burdensome irregularities encountered by these plaintiffs in seeking a state forum for their constitutional claims illustrate to this court that in practice the state procedures operate in such a manner as to prevent or, at the very minimum, substantially delay the presentation of constitutional issues. Under such circumstances, abstention would be inappropriate. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1325 (1977).

In addition to the apparent procedural futility of requiring the plaintiffs to proceed with the pending suit, the statutory scheme on its face fares no better. The very nature of the constitutional challenge here is to the fairness of the state procedure. Such being the case, especially when compounded by the irregularities present here, it "plainly appears" that the state forum would not offer these plaintiffs adequate protection in their challenge to the state procedures, even assuming all matters could be raised in a defense to the pending "Suit Affecting the Parent-Child Relationship." *Gibson v. Berryhill*, 411 U.S. 464, 469 (1973).

Therefore, because of the failure of the state to follow its procedures and because of the futile efforts of the plaintiffs to seek relief in the state system,[7] this court finds that there is for these plaintiffs no "opportunity to fairly pursue their constitutional claims in an ongoing state proceeding."

Accordingly, this court holds that abstention is not required because *Younger* principles do not apply to this dispute between the plaintiffs and the State of Texas and, even if such principles do apply, there exist extraordinary circumstances which compel this court to provide a federal forum for the vindication of these plaintiffs' constitutional rights. Having so decided, we must address the merits of the plaintiffs' case.

II. MERITS

At the outset it must be noted that there is no dispute between the parties as to the gravity of child abuse and the compelling state interest in quickly and effectively removing the victims of child abuse from their parents. Similarly, the parties agree that where real, immediate, and irreparable physical harm is likely, the state has an interest in taking so-called "emergency" possession of the children. The gravamen of the plaintiffs' complaint is that in effectuating the legitimate state interest, the TEXAS FAMILY CODE does so in a manner which contravenes basic constitutional principles. They have mounted a broad-based challenge to Chapters 11, 14, 15, 17, and 34 of Title 2, TEXAS FAMILY CODE.

This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent. Briefly, the procedure under surveillance here begins with Chapter 34, which is concerned with the reporting of suspected child abuse and the initial investigative steps by the State Department of Public Welfare. Once suspected abuse is

identified under Chapter 34, Chapter 17 enables the State to take possession of the victims for the "Protection of [a] Child in [an] Emergency."[8] By the terms of Section 17.05(b)(2), the state may then institute a "Suit Affecting the Parent-Child Relationship." This term of art is defined in Section 11.01(5) as

> "a suit . . . in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought."

Such a suit, therefore, refers both to a Chapter 14 proceeding, in which the appointment of a conservator is sought, and to a Chapter 15 proceeding, which is entitled "Termination of the Parent-Child Relationship."

In the suit filed by these defendants at the direction of Judge Lowry, pending in Montgomery County, only Chapter 14 relief was being sought at the time the court issued the preliminary injunction. Consequently, the defendants have questioned the standing of the Sims parents to challenge the constitutionality of any part of Chapter 15. This court finds, however, that the spectre of a Chapter 15 suit involving the Sims family is sufficient to confer standing. *See O'Shea v. Littleton*, 414 U.S. 488 (1974); *Massachusetts v. Mellon*, 262 U.S 447 (1923). The caseworker assigned to investigate the Sims family, Rex Downing, testified in his deposition that he would seek permanent termination of the parent-child relationship as part of the Montgomery County action, which is entitled broadly "Suit Affecting the Parent-Child Relationship."

It is now clear that there is a fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted

intrusions by the state. The Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972) commented:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "rights far more precious than property rights." It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. [Citations omitted.]

405 U.S. at 651. *See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1943); *May v. Anderson*, 345 U.S. 528 (1953); *Griswold v. Connecticut*, 381 U.S 749 (1965); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Alsager v. Disrict Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975); *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976). Having emphasized the importance of such a right, courts are required to carefully scrutinize any attempt by a state to intrude upon it. It is axiomatic that where due process must be afforded, the courts must still decide what process is due. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). In making such an analysis, the competing interests must be identified and weighed. There are three: the liberty and privacy interest afforded to the parents, the interest of the state, as *parens patriae*, in protecting children from harm and, finally, the often silent interest of the child.

Reporting Child Abuse. Chapter 34 of Title 2, TEXAS FAMILY CODE is directed at the preliminary investigative powers of the state before any judicial relief is sought. Although recognizing the need to encourage the reporting and investigation of suspected cases of child abuse or neglect, we find that three aspects of Chapter 34 violate minimal constitutional guarantees. First, to the extent that a court order under § 34.05(c)[9] may be obtained without notice to the parents and upon any showing less than that the relief sought is necessary to aid in the determination of the existence of any abuse, it violates due process by permitting an unbridled invasion of the family unit. There is little doubt that the mandate of due process extends to an investigative stage of state action. Psychological or psychiatric examinations represent such an intrusion into the privacy of the family that, if objected to, should not be ordered without some type of adversary hearing before a judicial body. The state's interest in the protection of the child is not endangered by the requirement of such notice because of the existence, under unusual circumstances, of the course of action available under § 34.05(d).[10]

A second constitutional defect in the system of reporting child abuse appears in Section 34.08, which provides:

> The reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency.

Despite assurances from the state that the investigation permitted by Chapter 34 is "nonaccusatory," it is undisputed that the information

gathered pursuant to that chapter is used as a basis for further action by the state under Chapters 17, 14, or 15.

Although some intrusion into a family unit is permissible when the state pursues its interest in investigating reports of abuse, there is no compelling reason to deny the family access to the fruits of that invasion or the conclusions reached. Of course, a certain confidentiality must be maintained for sources of information who request such anonymity, but the reports[11] and records of the state compiled during the investigation should be available to the parents so that they may be fully apprised of the nature of any accusation to be made by the state. Due process requires no less. A state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of the need for confidentiality in an adversary proceeding.

Finally, with regard to Chapter 34, this court finds that Section 34.06[12] represents an unconstitutional infringement on the right to privacy and the guarantees of due process. In implementing that section, the State Department of Public Welfare has devised the Child Abuse and Neglect Report and Inquiry System (CANRIS). CANRIS is a computerized system designed to collect and store the confidential information gathered by the state from the inception of an investigation through final disposition. It is clear from the expressed purpose of CANRIS that it goes far beyond the permissible maintenance of investigatory files. The mere filing of a report of child abuse is cause enough for the system to operate. The record in this case indicates that CANRIS places labels of "perpetrator" on those parents who are ensnarled into its web--a conclusion reached by the state without any judicial determination. Similarly, CANRIS may label the

report as "validated," which by the terms of its operation manual is appropriate where "the investigating worker has proved that neglect or abuse exists." This use of information gathering and dissemination absent a judicial determination of abuse neglect is an impermissible violation of due process and right to privacy. Of course, the state may maintain investigative files. However, to the extent that CANRIS purports in any way to be a clearinghouse of child-abuse information without a judicial determination thereof, it is an unconstitutional infringement on the rights of the parents.

The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis*, 424 U.S. 693 (1976). In that case, the Supreme Court held that an interest in one's reputation alone was not a "liberty" or "property" interest requiring due process before it could be altered by the State. The Court carefully distinguished "matters relating to marriage, procreation, contraception, family relationship, and child rearing and education" as being "far afield" from that plaintiff's claim. 424 U.S. at 713. Therefore, we find that the current use of a central registry for child-abuse reports is unconstitutional.

Summary Seizure. Although the State of Texas has an interest in protecting children from abuse as quickly as possible, that interest is not sufficient to justify removal of the child without notice and an adversary hearing unless there exists an immediate threat to the safety of the child. Chapter 17 is the attempt by the Texas Legislature to deal with such an emergency.[13] An emergency, however, does not permit the State to disregard all notions of due process. In that regard, we find the procedures of Chapter 17 to be patently and flagrantly violative of basic constitutional guarantees.

Section 17.01 allows the State Department of Public Welfare to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." Such language represents a constitutionally adequate standard.[14] After seizure, however, the "hearing" required by Section 17.02 is, in reality, no more than an ex parte presentation of a petition to a court without actual delivery of the children to the court. Although an ex parte order under these circumstances is, in itself, not constitutionally infirm, and the "hearing" may, pursuant to Section 17.03, proceed "without notice," the due process interest of the parents is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the court.

Section 17.02 currently requires that the appropriate petition be filed "immediately on delivery of the child to the court" and requires that the ex parte "hearing" be held "to provide for the temporary care or protection of the child." Two constitutional defects exhibit themselves. First, there is no requirement that the hearing itself be held "immediately." Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure. Secondly, through what this court assumes to be legislative oversight, the hearing is "to provide for the temporary care or protection of the child"--language which assumes that such care or protection is needed.

It is Sections 17.05 and 17.06 that are frought with constitutional defects. After the State takes emergency custody of the child and there has been a preliminary ex parte judicial determination of the propriety of the State's act, a full adversary hearing with notice should

be held at the expiration of the ex parte order. Section 17.05 currently requires no such hearing at the expiration of the initial order and, instead, places a clearly unconstitutional burden on the parents, via Section 17.06, to seek a modification of the order. In the event the children remain in the custody of the State pursuant to the temporary order, due process requires that in all cases a full hearing be held or that the children be returned to the custody of their parents. The fact that the parents may have been present at the initial temporary "hearing" does not relieve the State of the obligation to conduct the full adversary hearing with adequate notice to the parents. Such notice, of course, includes an adequate statement in the petition of the factual allegations upon which the State is relying to support Chapter 17 relief. Furthermore, to the extent that Section 17.05 (b) (2) permits a court to "direct the filing of a suit affecting the parent-child relationship" without having first determined the need therefor in a full adversary hearing, it is an unconstitutional deprivation of due process.

The questions remains as to how long the children, under these emergency situations, may be separated from their parents without a hearing. We regard Section 17.05's suggestion of a ten-day period to be constitutionally acceptable although, in the view of this court, the five-day period upheld in *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), would offer a better solution. The ten-day period, however, may not run from the "date of the [initial] order." Other summary deprivations of a property or liability interest have been upheld for a period measured from the date of the deprivation. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975). The record in the instant case reflects that the date of the seizure and the date of the initial orders may not be the same. Therefore, what this court perceives to be the constitutional limit of ten days must run from the

date on which the State removed the children from the custody of their parents.

In particular, the State may not obtain a ten-day ex parte order under Chapter 17 and then, through the vehicle of Section 17.05(b) (2), institute a suit affecting the parent-child relationship and obtain another ten-day ex parte order under Section 11.11(a) (4). This "stacking" of ex parte orders may result, under current statutory provisions, in a minimum of a twenty-day period during which the parents may be deprived of the custody of their children without an adversary hearing before an impartial tribunal. This court reiterates that under no circumstances, either under Chapter 17 or under Section 11.11(a) (4), may the State retain custody of the child for more than ten days without a complete adversary hearing with notice to the parents.

At the required hearing, the State must make a clear showing that continued custody is necessary to protect the child from physical danger. Even a temporary order under Section 11.11 may be based on no less a showing. Should the State be entitled to continued custody, the nature of the interests here require that a suit affecting the parent-child relationship should commence immediately so that the swiftest resolution of the merits may be obtained.

Standard of Proof. Section 11.15 provides for a preponderance of the evidence standard in any suit affecting the parent-child relationship. While such a suit is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358 (1970), the fundamental right to family integrity requires at the very least that the State notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County, Iowa, supra.*[15]

Appointment of Counsel. Section 11.10 provides in pertinent part:

> (a) In any suit in which termination of the parent-child relationship is sought, the court shall appoint a guardian ad litem to represent the interests of the child, unless the child is a petitioner or unless an attorney at sic litem has been appointed for the child or unless the court finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.
>
> ....
>
> (c) The court may appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject matter of the suit.

The plaintiffs have argued that this provision violates the due process clause of the constitution by not requiring the appointment of an attorney for the child. This court agrees. Certainly, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). In a suit for the involuntary termination of parental rights, the child's interest is generally distinct from that of either the State or the parents. In *In Re Gault*, 387 U.S. 1 (1967), the Supreme Court recognized the separate interest of a child in a juvenile delinquency proceeding as one deserving of constitutional protection.[16] The mere fact that a proceeding under the TEXAS FAMILY CODE is labeled "civil" and a delinquency proceeding as "criminal" simplistically ignores an analysis of the real interests involved and the rights of all parties to a fair hearing. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). Therefore, in any proceeding in which the termination of the parent-child relationship is sought, the court is required to appoint counsel to represent the

interests of the child and require the parents to pay for that representation, if they are able to do so. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976). If, as the statute suggests, another party would adequately represent the interests of the child, an appointment of counsel for the child would be unnecessary as long as such representation was through an attorney. Section 11.10 allows another party to represent the child only if there are no adverse interests. While this condition is constitutionally sufficient on its face, it has been applied unconstitutionally to the extent that the state itself has been appointed as the other party to represent the child. We have repeatedly herein emphasized the separate competing interests necessarily involved in any suit affecting the parent-child relationship. The interest of the state and the interest of the child differ in such a manner that they must be assumed to be adverse until there has been a final adjudication on the merits.

Because of the requirement of an attorney for the child at these proceedings, it follows that it must include representation at an "emergency" proceeding under Chapter 17, the result of which may be the institution of a suit for the termination of the parent-child relationship.

With regard to the appointment of counsel for the parents at any proceeding for the termination of parental rights, it is agreed that the plaintiffs in the *Sims* case, not being indigent, do not raise the issue. The *Woods* case was consolidated with the *Sims* case solely on the right of indigent parents to counsel. This court has carefully studied the arguments of counsel and we concur with the defendants that the named plaintiffs in the *Woods* case lack standing to raise that issue. The record is clear that both plaintiffs Woods and Troncosa were represented in the termination proceedings by counsel provided by the Houston Legal Foundation, a legal services corporation.

The *Woods* case is a class action pending before another judge of this court. In light of recent decisions of this Circuit, it appears that our limited consolidation of the *Woods* case before class certification was ill-advised. *See McArthur v. Southern Airways, Inc.*, 556 F. 2d 298 (5th Cir. 1977); *Satterwhite v. City of Greenville*, ___F.2d___, No. 75-3377 (5th Cir., August 12, 1977). Because there has been no decision as to the maintainablitiy of a class in that case, we only consider the standing of the two named plaintiffs and direct that the issue of the right to counsel for parents in the putative class remain pending with the *Woods* case.

Therefore, for the reasons stated herein, the court finds that the following provisions of Title 2, TEXAS FAMILY CODE--Sections 11.10, 11.15, 17.02, 17.03, 17.05, 17.06, 34.05(c), and 34.08--are unconstitutional on their face; and the defendants are permanently enjoined from applying and enforcing these provisions. Furthermore, the court finds that the use of CANRIS as provided for in Section 34.06 for information gathering and dissemination of child abuse reports absent a judicial determination of abuse or neglect and the use of Section 11.11(a)(4) in conjunction with Chapter 17 to deprive parents of custody of their children for longer than ten days without an adversary hearing are unconstitutional applications of these provisions; and the defendants are permanently enjoined from so applying or enforcing them.

Finally, the plaintiffs have sought monetary relief in the nature of actual damages and punitive damages for what the First Amended Complaint describes as a "wreckless, wilful and wanton disregard" of their rights. Upon careful consideration of the facts of this case, the nature of the constitutional challenge, and the decision of this court, we find no evidence to support the award of any monetary damages.

DONE at Houston, Texas, on the 12th day of *October*, 1977.

s/s
Joe Ingraham
Senior United States Circuit Judge

s/s
John V. Singleton
United States District Judge

s/s
Ross N. Sterling
United States District Judge

FOOTNOTES

[1] The relevant sections of Chapter 17 of the TEXAS FAMILY CODE are as follows:

Section 17.01. Taking Possession in Emergency.

An authorized representative of the State Department of Public Welfare, a law-enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle. . . . The child shall be delivered immediately to the court.

Section 17.02. Hearing.

Unless the child is taken into possession pursuant to a temporary order entered by a court under Section 11.11 of this code, the officer or representative shall file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child.

Section 17.03. Notice.

The proceeding under Section 17.02 of this code may be held without notice.

Section 17.04. Grounds and Disposition.

On a showing that the child is apparently without support and is dependent on society for protection, or that the child is in immediate danger of physical or emotional injury, the court may make any appropriate order for the care and protection of the child and may appoint a temporary managing conservator for the child.

Section 17.05. Duration of Order.

(a) An order issued under Section 17.04 of this code expires at the end of the 10-day period following the date of the order, on the restoration of the child to the possession of its parent, guardian, or conservator, or on the issuance of ex parte temporary orders in a suit affecting the parent-child relationship under this subtitle, whichever occurs first.

(b) If the child is not restored to the possession of its parent, guardian, or conservator, the court shall:

(1) order such restoration of possession; or

(2) direct the filing of a suit affecting the parent-child relationship in the appropriate court with regard to continuing jurisdiction.

Section 17.06. Modification.

On the motion of a parent, managing conservator, or guardian of the person of the child, and notice to those persons involved in the original emergency hearing, the court shall conduct a hearing and may modify any emergency order made under this chapter if found to be in the best interest of the child.

[2] *Section 11.11. Temporary Orders.*

(a) In a suit affecting the parent-child relationship, the court may make any temporary order for the safety and welfare of the child, including but not limited to an order:

....

(4) taking the child into the possession of the court or of a person designated by the court;

....

(b) Temporary orders under this section are governed by the rules governing temporary restraining orders and temporary injunctions in civil cases generally.

[3] *Section 11.06. Transfer of Proceedings.*

(a) If venue is imporperly laid in the court in which a suit affecting the parent-child relationship is filed, and no other court has continuing jurisdiction of the suit, the court, on the timely motion of any party other than the petitioner, and on a showing that venue is proper in another county, shall transfer the proceeding to the county where venue is proper.

[4] As an example of the Supreme Court's Permitting possible intervention after *Trainor* because of the peculiar nature of the dispute and the interests involved, *see Doe v. Maher*, 414 F.2d

1368 (D. Conn. 1976), *vacated and remanded on other grounds*, ___ U.S. ___, 45 U.S.L.W. 3820 (No. 76-878, June 20, 1977).

[5] For example, the plaintiffs complain of the methods by which child-abuse reports are received recorded and the fact that even anonymous report of child abuse will label the parents as "child abusers" in a central registry, to become part of a national registration system before any judicial proceeding of even an emergency nature. Title 2, TEXAS FAMILY CODE § 34.06.

[6] Some commentators have viewed such a finding as creating an exception of "futility" or "bias" to otherwise applicable *Younger* principles. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1324-26 (1977).

[7] In a recent case, *Ross v. Houston Independent School District*, ___ F.2d ___ (5th Cir. 1977) [Slip Opin. Sept. 8, 1977], the court held:

> The abstention doctrines do not embody jurisdictional principles nor are they to be considered as rules of law. Rather, their application is committed to the exercise of a sound discretion based on the facts of each case. *Hill v. City of El Paso, Texas*, 437 F.2d 352 (5th Cir. 1971). The piecemeal results and delays attendant to abstention should not be imposed on the parties to a federal proceeding unless state court action holds realistic promise of avoiding constitutional issues. *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). Any consideration of abstention, whether under *Pullman* or other doctrines ["(2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket," C. A. Wright, Law of Federal Courts, 3d ed. 218], must take into primary account its effects on the rights sought to be protected in the court asked to stay its hand.

[8] *See* Title 2, TEXAS FAMILY CODE §§ 34.05(d), *infra* at n.9, which allows the institution of a Chapter 17 proceeding during or as a result of a Chapter 34 investigation.

[9] (c) The investigation shall include a visit to the child's home, a physical and psychological or psychiatric examination of all the children in that home, and an interview with the subject child. If

admission to the home, school, or any place where the child may be, or permission of the parents or persons responsible for the child's care for the physical and psychological or psychiatric examinations cannot be obtained, then the juvenile court, or the district court, upon cause shown, shall order the parents or the persons responsible for the care of the children, or the person in charge of any place where the child may be, to allow entrance for the interview, above examinations, and investigations.

(d) If, before the investigation is complete, the opinion of the investigators is that immediate removal is necessary to protect the child from further abuse or neglect, the investigators shall file a petition pursuant to Chapter 17 of this code for temporary care and protection of the child.

[10] *Id.*

[11] Section 34.05(e) requires the appropriate agency to make a complete written report of their investigation.

[12] *Section 34.06. Central Registry.*

The State Department of Public Welfare shall establish and maintain, in Austin, Texas, a central registry of reported cases of child abuse or neglect. The department may adopt rules and regulations as are necessary in carrying out the provisions of this section. The rules shall provide for cooperation with local child service agencies, including hospitals, clinics, and schools, and cooperation with other states in exchanging reports to effect a national registration system.

[13] The relevant portions of Chapter 17 are set out in note 1, *supra*.

[14] The standard of Section 17.01 is far more acceptable than the one found to be unconstitutional by the court in *Roe v. Conn*, 417 F. Supp. 769 (1976). In that case, Alabama Code, Title 13, § 352(4) provided for emergency custody of the child when "its welfare requires."

[15] *See also* National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 26 (1969); *Singleman*, A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings, 17 ARIZ. L. REV. 1055, 1087 (1975).

[16] *Cf. Hegwood v. Kindrick*, 264 F. Sup. 720 (S.D. Tex. 1967).

APPENDIX B

JUDGMENT
DATED: February 23, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-665
Defendants.	§	
DOROTHY MAE WOODS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-1120
Defendants.	§	

JUDGMENT

Consistent with the opinion of this Court entered in the above causes on October 12, 1977, IT IS ORDERED, ADJUDGED AND DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents

before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing physical, psychological, or psychiatric examinations is necessary to aid in the investigation of abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their direction, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *23rd* day of *February*, 1978.

s/s

JOE INGRAHAM
Senior United States Circuit Judge

s/s

JOHN V. SINGLETON, JR.
United States District Judge

s/s

ROSS N. STERLING
United States District Judge

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APPENDIX C

AMENDED JUDGMENT
DATED: March 8, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-665
DOROTHY MAE WOODS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-1120

AMENDED JUDGMENT

Consistent with the opinion of this court entered in the above causes on October 12, 1977, it is ORDERED, ADJUDGED, and DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an

attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their discretion, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but

that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *8th* day of *March*, 1978.

s/s
JOE INGRAHAM
Senior United States
Circuit Judge

s/s
JOHN V. SINGLETON, JR.
United States District Judge

s/s
ROSS N. STERLING
United States District Judge

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APPENDIX D

TEXAS DEPARTMENT OF HUMAN RESOURCES EXECUTIVE LETTER DATED MARCH 1, 1978

and

TEXAS DEPARTMENT OF HUMAN RESOURCES MEMORANDUM DATED MARCH 3, 1978

TEXAS DEPARTMENT OF HUMAN RESOURCES

EXECUTIVE LETTER

Date: March 1, 1978 **Number: 78-5**

Effective Date: March 6, 1978 **Expiration Date: December 31, 1978**

To: All Field Staff **From: Jerome Chapman, Commissioner, State Office**

Subject: Federal Court Decision Holding Unconstitutional Certain Sections of Chapters 11, 17, and 34, Title 2, Texas Family Code (John Pleasant Sims, et al. v. Raul Jimenez, et al.)

A three-judge panel of the United States District Court for the Southern District of Texas, Houston Division, has ruled certain sections of Chapters 11, 17, and 34, Title 2, Texas Family Code to be unconstitutional. The ruling permanently prohibits DHR, and all persons acting in cooperation with DHR, or at DHR direction, from applying or enforcing the provisions held unconstitutional.

Note: In this material, Chapters of the Texas Family Code will be referred to by number rather than name. Department staff must be thoroughly familiar with the names and numbers of these chapters:

Chapter 11 - General Provisions (in suits Affecting the Parent-Child Relationship)
Chapter 14 - Conservatorship, Possession and Support of Children

Chapter 15 - Termination of the Parent-Child Relationship
Chapter 17 - Suit for Protection of Child in Emergency
Chapter 34 - Report of Child Abuse

basic topics in the cases are summarized as follows:

I. Confidentiality of Case Records
II. Central Registry of Child Abuse or Neglect Cases
III. Standard of Proof
IV. Attorney Ad Litem
V. Investigative Examinations
VI. Emergency Removal

Existing policy relating to Topic, Confidentiality of Case Records, must be carefully followed. Department policies relating to Topics II through VI must be modified. Until appropriate handbook revisions can be published, the policies and procedures contained in this Executive Letter must be used in lieu of those in the indicated portions of the Handbook.

TOPIC I — CONFIDENTIALITY OF CASE RECORDS

Social Services Handbook Item 7113, (Texas Family Code, Section 34.08)

The judgment requires that DHR case records on the parents and child, except for the complainant's identity, be accessible to the parents, the child, or their representatives, so that they may be fully apprised of the nature of any accusation made by the State (DHR).

Current DHR policy provides for release of information to the parents or their representatives. When parents or their representatives ask to review DHR records, Form 4700, Request for Records of Texas Department of Human Resources, must be completed in accord with policies in Item 7113.

TOPIC II — CENTRAL REGISTRY OF CHILD ABUSE OR NEGLECT CASES

Social Services Handbook Item 7222.1, (Texas Family Code, Section 34.06)

The Court stated that the previous use of CANRIS as a clearinghouse of child abuse and neglect information without a judicial determination of abuse or neglect was unconstitutional because it was a violation of due process and the right to privacy.

However, the Court affirmed the State's (DHR's) right to maintain investigative files on child abuse or neglect and to maintain a more restricted Central Registry.

The effect of the Sims judgment is to limit client-identified information in the CANRIS system to cases in which a judicial (civil or criminal) determination of abuse or neglect has been made. The judgment allows entry into CANRIS of statistical reports without client-identified information on all reported cases. Until CANRIS can be redesigned, the following interim process will be used. It makes as few changes to the current system as possible, while meeting the requirements of the Court.

INTERIM CANRIS PROCESS

Immediately upon receiving a complaint appearing to involve abuse or neglect, the worker must make a CANRIS inquiry, unless the case is currently active and the information has already been received. The inquiry will determine if previous incidents have occurred in which a civil or criminal judicial determination of abuse or neglect was made. Only DHR staff authorized in Item 7222.1 may inquire into CANRIS. **No initial report to CANRIS will be made at the time of inquiry.**

Workers must make CANRIS reports of all abuse/neglect reports investigated and of all deaths of children reported to DHR pursuant to Section 34.02(a), Texas Family Code. As described below, client identifying information is entered into the actual CANRIS computer system only when a civil or criminal court has determined that child abuse/neglect occurred.

Workers make CANRIS reports when the investigation is completed. They update the report if court action is subsequently taken. The update is made at the time the county/district/criminal district attorney or court renders a decision on the request or referral for court action (petition filed, petition withdrawn, court order issued, etc.). The court order can be one issued after a 24-hour hearing, a 10-day hearing, when a court case is dismissed, when parental rights are terminated, or at any other appropriate time. (For more information about the 24-hour and 10-day hearings, see Topic VI below.) **There will no longer be initial reports, only finalized reports.**

CANRIS reports are made by completing Form 2202-A, Children's Protective Service Intake and CANRIS Report, and sending it or calling the information to the local telecommunications site. The terminal operator enters the report into CANRIS. Form 2202-B, CANRIS Feedback Report, with a CANRIS incident number, will be printed by the computer from information entered by the terminal operator. Form 2202-B is then mailed to the worker for filing or updating.

CANRIS reports are entered on the computer by the terminal operator in one of two formats. The terminal operator enters a **client-identified** report on only validated cases of abuse/neglect where conservatorship has been placed with DHR, conservatorship has been changed, or an individual has been convicted of a crime involving child abuse/neglect. On all other cases, the

terminal operator enters a **statistical** report with no client-identifying information.

Local cross reference controls must be established between case names and CANRIS incident numbers to ensure that client identified and client de-identified Forms 2202-B are filed in correct case folders.

Details of these CANRIS procedures will be issued to Department staff in a separate memo.

The implications for DHR of the changes in CANRIS are that the numbers of reports available for inquiry will be less than one-twentieth of the current number.

TOPIC III — STANDARD OF PROOF

Texas Family Code, Section 11.15

The Texas Family Code requires the burden of proof in a suit affecting the parent-child relationship to be measured by the "preponderance of the evidence" standard. The Sims judgment changes the burden of proof for the State (DHR) when seeking conservatorship or termination to the "clear and convincing evidence" standard.

Courts have held "clear" to mean not ambiguous, equivocal, or contradictory, and "convincing" to mean evidence sufficient to convince an unbiased and unprejudiced mind. To be admissible, clear and convincing evidence can include only those causes of harm to the child which are alleged in the petition. Staff must seek and follow legal advice about what constitutes evidence and proof to a "clear and convincing" degree.

The implication of this ruling for the Department is that staff must be precise and inclusive in their petitions. It will also be more difficult to prove cases in court since the standard of "clear and convincing evidence"

requires more quantity and/or quality of evidence and requires proof to a more certain degree than the "preponderance of the evidence" standard.

TOPIC IV — ATTORNEY AD LITEM

Social Services Handbook Item 7324, (Texas Family Code, Section 11.10)

The Court found Section 11.10 of the Texas Family Code unconstitutional since it did not require an attorney ad litem to be appointed to represent the child in all suits affecting the parent-child relationship under Chapters 14, 15, and 17 of the Texas Family Code in which DHR protective services staff sought conservatorship or termination of the parent-child relationship. In these situations, the Court found the child's interest to be generally distinct from and adverse to interests of either the State (DHR) or the parents. Since these interests are separate and competing, the child deserves the constitutional protection of representation by an attorney ad litem at all such proceedings. The Sims Court stated that the court trying the suit must require the parents to pay for the child's representation, if they are able to do so.

The Court declined to rule on the parents' right to a court-appointed attorney when the parents could not afford the services of an attorney. The issue of whether indigent parents have a right to court appointed counsel is still pending in a suit before another court.

The implication for the Department of the requirement that an attorney ad litem be appointed for the child will lie primarily in drawing the court's attention to this litem. This is a difficult issue since the courts may lack funds to pay for attorneys ad litem when the parents cannot, and the attorneys ad litem must be obtained for all hearings, including the 24-hour hearing under Chapter 17.

TOPIC V — INVESTIGATIVE EXAMINATIONS

Social Services Handbook Item 7223, (Texas Family Code, Section 34.05(c)).

The investigation currently required by Section 34.05(c), Texas Family Code, includes a visit to the child's home, a physical and psychological or psychiatric examination of all children in that home, and an interview with the referred child. If permission for admission to the home or for the examinations needed to protect the child cannot be obtained, DHR is authorized to petition the Court for an appropriate ex parte order. **Note:** An ex parte order is an order which is issued on the basis of a hearing at which only one party to the suit had the opportunity to present its side of the case.

The Sims judgment does not change any substantive requirements in 34.05(c), Texas Family Code. Because the examinations constitute an intrusion into the privacy of the family, the Court, requires an adversary hearing after notice to the parents whenever parents object to physical, psychological, or psychiatric examinations. **Note:** An adversary hearing is one in which each party to the suit has been given the opportunity through service of citation and notice to be there and each party presents its side of the case.

The adversary hearing during the investigation is initiated by filing a suit affecting the parent-child relationship and seeking appropriate action under Section 34.05(c), Texas Family Code. The required notice to the parents is satisfied by serving them citation, including a copy of the petition and notice of the time of the hearing. DHR must show that the required examinations are necessary to determine the existence of abuse or neglect.

The Court was careful to point out that the State's (DHR's) interest in the protection of the child is not endangered by the requirement for a hearing because of the existence of Section 34.05(d), Texas Family Code, which allows for emergency protection under Chapter 17, Texas Family Code. That is, if these examinations are required to protect a child in an emergency, the Department may take emergency custody of the child and consent to the examinations after the 24-hour hearing (see Topic VI below).

Requiring an adversary hearing before seeking psychological or psychiatric examinations of children when parents refuse to consent to them will probably have minimal implications for the Department because of the following factors:

1. The Department seldom seeks psychological or psychiatric examinations under these circumstances because they are seldom needed to protect children from death or permanent harm.

2. If the child is in a situation of immediate danger to his physical health or safety, the Department can seek managing conservatorship to obtain the right to consent to the examination. (See paragraphs on ex parte court ordered removal and emergency removal under Topic VI below.) However, this will require more drastic action than the Department has formerly been required to take.

Requiring an adversary hearing before seeking physical examinations of children when parents refuse to consent to them has considerable implications for the Department in attempting to protect children. Although ex parte court-ordered physical examinations are not frequently sought during the investigation, they are always sought when the child appears to be in

danger of possible death or permanent harm and the parents refuse to allow physical examination and treatment. Under Sims, to obtain the examination, the Department must wait until an adversary hearing can be held and thus leave the child in potential danger for a period of time, or the Department must obtain conservatorship for the purpose of consenting to the examination, which involves as much or more of an intrusion into the family's privacy and parental rights than previously required by an ex parte court order for the examination.

TOPIC VI — EMERGENCY REMOVAL

Social Services Handbook Item 7330, (Texas Family Code, Section 17.01 et seq)

The Court recognized the interest of the State (DHR) in protecting children from abuse and neglect as quickly as possible. The Court approved the current language in Section 17.01, Texas Family Code, that allows DHR to take custody of a child to protect him from an immediate danger to physical health or safety. However, the Court found that Sections 17.02, 17.03, 17.05, and 17.06 violated parents' constitutional rights by not requiring that the Department:

1. Make every reasonable effort to serve notice on the parents that a hearing on the removal will be held within 24 hours after removal.

2. Hold an adversary hearing within 10 days of removal, with service of citation and notice to the parents if continued custody is sought.

Before removing a child in an emergency, the Department must consider the following courses of action in the priority of their listing. The worker and supervisor must document the reasons why a court

action earlier on the following list is not taken before taking one later on the list.

1. **Court-ordered removal** — Remove the child pursuant to a written court order which is based on a Chapter 14 or 15 suit filed by DHR and which is issued following an adversary hearing.

2. **Ex parte court-ordered removal** — Remove the child pursuant to a written ex parte court order, which is based on a Chapter 14 or 15 suit filed by DHR and which is issued under the authority of Section 11.11(a)(4). An adversary hearing must be scheduled within 10 days after the date of the court order and the parents served with citation and notified of the hearing. The ex parte order must be a written order; it cannot be a verbal order.

3. **Emergency removal** — Remove the child pursuant to Chapter 17 without a court order, with an ex parte hearing to be held within 24 hours after removal. An adversary hearing must be scheduled within 10 days after the date of removal and the parents served a citation and notified of the hearing. This ex parte order must be a written order; it cannot be a verbal order.

DHR defines emergency removal as removal of a child from his home or other place where he is receiving care without written parental consent and before a court order is obtained. **Emergency removal can be made only as a last resort in protecting a child. Emergency removal can be made only when all of the following factors can be documented:**

1. The child is in a situation which is of immediate danger to his physical health or safety. Immediate physical danger does not include emotional, potential, non-emergency, or non-physical abuse/neglect.

2. Ex parte court-ordered removal procedures cannot be carried out in sufficient time to protect the child from physical harm. That is, the worker has reasonable evidence, which he can verify and document, that the child would suffer physical harm between the time the worker could leave the child and the time he could return with the ex parte court order authorizing removal.

3. Available resources to protect the child in his home have been considered and found to be insufficient. Examples of these resources are emergency homemaker, protective day care, a relative or neighbor staying with the child in the home, or other similar types of resources.

If the worker and supervisor decide within the scope of the above factors that emergency removal of a child from his home is necessary, a law enforcement officer or Investigation Division staff person must accompany the worker when the child is removed from the home. If neither is available, the reason must be documented in the file and the concurrence of a social services program director must be obtained to authorize the child's removal. In addition, a protective service supervisor or another worker or DHR employee must accompany the worker when the child is actually removed. The person who accompanies the worker should attend the 24-hour hearing. If the worker was not accompanied by a law enforcement officer or Investigation Division staff person, the worker or supervisor must report the circumstances of the removal to the regional director for social services within 24 hours of the removal.

The Texas Family Code stipulates that the worker may remove a child without civil liability if the worker has reasonable cause when he removes the child to believe there was an immediate danger to the child's physical

safety (Texas Family Code, Section 17.09). The worker must verify whatever gave him "reasonable cause" to believe the child was in immediate danger and must document his verification in the case record.

All of the following steps must be taken after removing a child from his home under Chapter 17:

1. DHR must make every reasonable effort to serve notice on the parents. When the parents can be located, the worker must inform the parents orally or in writing that a hearing will be held within 24 hours, that they have the right to obtain the services of an attorney to represent them at that hearing, and of the location of the district court where the hearing will be held. DHR must document its efforts to inform the parents and should try to verify its efforts with witnesses.

2. Immediately after removal, DHR must bring the child physically before the court. (The Sims opinion states that "immediately" means within 24 hours of actual removal, "barring unusual circumstances," which it did not define.) A petition must be filed at or before the time the child is delivered to the court and a hearing is held. This means that district judges, county/district/criminal district attorneys, children's attorneys ad litem, Investigation Division or law enforcement staff, and DHR workers must be available seven days a week and 365 days a year to participate in Chapter 17 emergency removal proceedings.

   Oral authorization from the judge to remove the child cannot substitute for or eliminate the need for the 24-hour hearing required under the Sims judgment.

   If the hearing cannot be held because the district judge or county/district/criminal district attorney

cannot attend, the worker must return the child to the home and provide whatever services are possible to protect the child from death or other permanent physical harm. In these instances, the worker must inform in writing the district judge, county/district/criminal district attorney, local law enforcement officials, the regional attorney, and the regional director for social services of the child's circumstances. The danger to the child must be clearly stated.

3. Before or at the 24-hour hearing, DHR must file a Chapter 17 suit by and through the county/district/criminal district attorney and pursuant to Section 17.02, Texas Family Code. If evidence of the child's needs indicates possible need for continuing custody past the 10-day order, DHR should ask the county/district/criminal district attorney to join a Chapter 14 or 15 suit with the Chapter 17 suit. If the Chapter 17 suit is not filed in the county of the child's residence, a petition under Chapter 14 or 15 must be filed in the court of continuing jurisdiction. This should be done as soon as possible during the 10-day emergency order.

4. Before or at the 24-hour hearing, the court must appoint an attorney ad litem for the child.

5. At the 24-hour hearing, the court must determine whether the child is without support and is dependent on society for protection or is in immediate danger of physical injury, as set out in Section 17.04, Texas Family Code. If the court finds that the child is in either situation, the court may issue a 10-day emergency order (dating from the time of actual removal), naming the Department as temporary managing conservator. If the parents are present at the 24-hour hearing, they should be served while there with citation, including a copy of

the petition, and with the show cause order and notification for the 10-day hearing. If they are not present, the Department must make every reasonable effort to locate them and arrange for service of citation and notice to be made before the 10-day show cause hearing.

When the Chapter 14 or 15 suit is joined with the Chapter 17 suit, or otherwise filed in the court of continuing jurisdiction, the court must:

a. Order a show cause hearing on the Chapter 14 or 15 suit to be held before the 10-day emergency order expires.

b. Order service of citation and notice on the parents for the 10-day show cause hearing.

c. Make other orders as necessary for the 10-day show cause hearing, such as child support responsibilities of the parents or appointment of an interpreter for deaf parents.

6. The worker must get a written copy of the 10-day emergency order as soon as the court makes it available. This order expires as soon as either:

   a. The child is returned to the parents; or

   b. A Chapter 14 or 15 order is entered at the 10-day show cause hearing; or

   c. Ten calendar days have passed since the actual removal of the child.

DHR may not retain custody of a child for more than 10 calendar days from actual removal without an adversary hearing. The Court's opinion about this requirement is clear and unambiguous. The Court says:

> "...The State (DHR) may not obtain a 10-day ex parte order under Chapter 17 and then, through the vehicle of Section 17.05(b)(2), institute a suit affecting the parent child relationship and obtain another 10-day ex parte order under Section 11.11(a)(4). This "stacking" of ex parte orders may result, under current statutory provisions, in a minimum of a 20-day period during which the parents may be deprived of the custody of their children without an adversary hearing before an impartial tribunal. This Court reiterates, that under no circumstances, either under Chapter 17 or under Section 11.11(a)(4), may the State (DHR) retain custody of the child for more than 10 days without a complete adversary hearing with notice to the parents."

The 10-day show cause hearing must be an adversary hearing at which DHR must prove each of the following:

1. That the child was and would be in physical danger in the home.

2. That continued conservatorship is necessary to protect the child from such physical danger.

3. That the action requested is in the best interest of the child.

If the parents were not served for and failed to appear at the 10-day show cause hearing, DHR must document its efforts to locate the parents. If the child is not returned to his parents after the 10-day show cause hearing, a temporary order under Section 11.11 pursuant to Chapter 14 or 15 suit must be signed pending final adjudication. Such temporary orders signed after adversary hearings are generally indefinite unless limited to a specific time period. Remember, under

Sims, to keep a child continuously for more than 10 days, a Chapter 11 order may follow a Chapter 17 order only when an adversary hearing, that is a hearing for which the parents received service of citation and notice, occurred within 10 days of the child's removal.

DHR staff, under the direction of the county/district/criminal district attorney, must assess at each step in a Chapter 17 suit whether Sims judgment is being followed. If staff question at any time whether legal custody has or will become invalid because the Texas Family Code as affected by the Sims judgment has not been or will not be followed, legal advice must be immediately sought. DHR staff must document the legal counselor's response to their concern by filing in the child's case record correspondence to or from the legal counselor. **If the attorney believes that DHR does not have valid legal custody of the child, DHR must immediately satisfy the legal requirements for a valid court order, if that is within its power, or immediately return the child to the parents, regardless of the danger in which DHR believes this will place the child.** If the attorney or court believes the court order is valid but the Department disagrees because of one of the following or like reasons, Department staff must immediately satisfy the requirement for a valid court order or return the child to his parents:

1. There is not a written court order within 24 hours of the removal.

2. More than 10 calendar days have passed since the child was removed and no other valid order has been obtained.

3. DHR failed to make every reasonable effort to inform the parents of the 24-hour hearing.

If DHR must return the child, a program director must approve the return and the regional attorney and regional director for social services must be advised before hand. Before returning the child, DHR must report to the court in writing its planned actions, the reasons why DHR believes it must take this action, the danger DHR believes the child will be in, and the documentation of the legal counselor's belief about the invalidity of the court order. A copy of this court report must be placed in the case record.

If it is anticipated that the child may have to be returned because of a potentially invalid 24-hour order but evidence indicates the child would be in danger of physical harm in the home, DHR should ask the county/district/ criminal district attorney to obtain a valid ex parte order for retaining custody of the child. **If this action is taken, the child can not be kept in DHR custody for more than 10 days from the date the child was originally removed from the home.**

If the child is returned home because of an invalid court order, DHR must continue supervision of the child in the home.

If removal again appears necessary, DHR must consider the effect of repeated removals on the child, especially repeated unplanned removals, and the intent of the Sims judgment to protect parents' due process rights. DHR must fully and clearly document why it believes removal is again necessary and why alternate actions were not taken.

MISCELLANEOUS

This memorandum will be sent to all district judges and county/district/criminal district attorneys. Regional DHR staff must meet with these legal representatives after receiving this material to establish local

procedures for carrying out the requirements of the judgment.

Immediately upon receiving this material, the regional administrator must arrange for a meeting of all regional child protective service staff to discuss the implementation of this material in the region. The meeting should be led jointly by the regional attorney and regional director for social services.

This Executive Letter supplements or supercedes Information Letter 78-4, Legal Rights of Parents and Children in Child Protective Services, in so far as this Executive Letter either contains fuller information or is in conflict with the Information Letter.

If your have further questions, please discuss them with your regional attorney or contact Fred Biel, General Counsel, Legal Services Division, John. H. Reagan Building, Austin, 78701, 512/475-2006 (STS, formerly Tex-An, 822-2006); or Kay Love, Program Specialist, Protective Service for Children Division, John. H. Reagan Building, Austin, 78701, 512/475-6481 (STS 822-6481).

s/s

Jerome Chapman

JC:fh

MEMORANDUM

TEXAS DEPARTMENT OF HUMAN RESOURCES

SUBJECT: Sims v. Jiminez, et al

TO:
All Regional Administrators

FROM:
Jerome Chapman
Commissioner
Department of Human Resources
State Office, 000-0

DATE: March 3, 1978

The request which has been made by the Department for a stay of the Sims judgment pending appeal has not yet been acted on by the Court. However, the Court has indicated it will revise the judgment with respect to Section 34.05(c) of the Family Code by not requiring an adversary hearing before obtaining a court order for *physical* examinations.

Consequently, the E-letter and judgment will be effective March 6th, 1978, except for those portions concerning the requirement for an adversary hearing to seek physical examinations under Section 34.05(c). The Department is continuing to seek relief pending its appeal, and you will be informed of any further court action in this case which modifies this directive.

s/s

Jerome Chapman

JC:jbm

cc: All Regional Attorneys
All Regional Directors for Social Services
Merle Springer, 500-0
Frederick J. Biel, 170-0
Richard E. Orton, 525-0
Bobbie Mae Matthews, 530-0
Colin Carl
Homer Rodriquez, 700-0

APPENDIX E

NOTICE OF APPEAL
DATED: APRIL 20, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS AND SHAWANA EVETTE SIMS,	§	
Plaintiffs	§	
vs.	§	Civil Action No.
HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; JEROME CHAPMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, GENE LEGE, INDIVI-	§	76-H-665

DUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,	§
Defendants	§

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Notice is hereby given that Hilmar G. Moore, Raul Jimenez, Jamie H. Clements, Jerome D. Chapman, Gene Lege, and Marian Lockley, defendants herein, hereby appeal to the Supreme Court of the United States from the Amended Judgment entered in this action on March 8, 1978.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

s/s

C. J. CARL
Assistant Attorney General

Attorneys for Defendants

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has on this *18th* day of April, 1978, been sent by United States Postal Service, certified, return receipt requested, to the following:

Gladys R. Goffney
201 Main Street - Suite 542
Houston, Texas 77002

Nell H. Holloway
201 Main Street - Suite 542
Houston, Texas 77002

Jerry L. Gardner
910 Houston Bar Center Bldg.
Houston, Texas 77002

Martin J. Grimm
1318 Pech Road
Houston, Texas 77055

J. Patrick Wisemen
905 Richmond Avenue
Houston, Texas 77006

John Carter
GULF COAST LEGAL FOUNDATION
Successor to
HOUSTON LEGAL FOUNDATION
609 Fannin - Suite 1909
Houston, Texas 77002

s/s

C. J. CARL
Assistant Attorney General

APPENDIX F

MOTION TO STAY INJUNCTION PENDING APPEAL

and

ORDER DENYING MOTION DATED MARCH 15, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS, ET. AL.,	§	
Plaintiffs	§	
vs.	§	CIVIL ACTION NO.
	§	76-H-665
RAUL JIMINEZ, ET. AL.,	§	
Defendants	§	

MOTION TO STAY INJUNCTION PENDING APPEAL

TO THE HONORABLE DISTRICT COURT:

COMES NOW Raul Jimenez, et al, Defendants above named, and respectfully present this their application to stay the injunction granted in this case under the provisions of Rule 62(c), Federal Rules of Civil Procedure, because it is the bona fide intention of said Defendants to make proper and timely appeal to the Supreme Court of the United States.

The grounds upon which this application for stay are based are as follows:

1. That Defendants will be appealing the decision on the basis that this District Court should have abstained, and Defendants therefore request a stay of the judgment in its entirety.

2. That to prohibit the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as

provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse and neglect reports pending appeal would cause irreparable harm to Defendants unless the stay is granted and would cause substantial harm to the public interest by inhibiting the state's ability to gather information about and investigate suspected cases of child abuse.

3. That to apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard currently set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Defendants and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect.

4. That to require the appointment of an attorney ad litem for a child in all suits affecting the parent-child relationship in which the State is a party, especially as early as the one-day or 24-hour ex parte hearing, would be impossible since the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code.

5. That to require notice and hearing to parents prior to authorizing under Section 34.05(c) of Title 2 of the Texas Family Code physical examinations of children who are abused or neglected would dangerously delay treatment to children who are in need of emergency medical attention.

The grounds upon which Defendants' appeal will be based are substantially as stated above and for the reasons stated, Defendants respectfully request a stay of

the judgment of this District Court pending appeal by the Defendants.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

s/s

C. J. CARL
Assistant Attorney General

Attorneys for Defendants

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion to Stay has been sent by United States Postal Service, postage prepaid, certified, return receipt requested, to Ms. Gladys R. Goffney, 201 Main Street - Suite 504, Houston, Texas, 77002 and to Ms. Nell H. Holloway, 201 Main Street - Suite 504, Houston, Texas, 77002, and to Mr. John Carter, Gulf Coast Legal Foundation, successor to Houston Legal Foundation, 609 Fannin - Suite 1909, Houston, Texas, 77002, on this the *28th* day of February, 1978.

s/s

C. J. Carl

1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS,
ET AL.

V.

CIVIL ACTION NO.
76-H-665

STATE DEPARTMENT
OF PUBLIC WELFARE,
ET AL.

O R D E R

Having duly considered defendants' motion to stay pending appeal the injunction granted in the above-styled-and-numbered cause, the court finds the stay should not be granted.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that defendants' motion to stay injunction be, and is, DENIED.

DONE at Houston, Texas, on the *15th* day of *March*, 1978.

s/s

United States District Judge

APPENDIX G

APPLICATION FOR STAY OF AMENDED JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION TO THE HONORABLE LEWIS F. POWELL, JR.

and

LETTER FROM CLERK OF UNITED STATES SUPREME COURT WITH NOTATION "Denied L.F.P. 3/29/78"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

RAUL JIMENEZ, ET AL.,

Petitioners

vs.

JOHN PLEASANT SIMS, ET AL.,

Respondents

APPLICATION FOR STAY OF JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

TO THE HONORABLE LEWIS F. POWELL, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Petitioners pray that an order be entered staying the judgment of the United States District Court for the Southern District of Texas, Houston Division, entered on February 23, 1978, and amended on March 8, 1978, pending appeal and a final determination of the matter

by this Court. In support of this application, Petitioners respectfully show as follows:

1. This suit was instituted in the United States District Court for the Southern District of Texas, Houston Division by Respondents, seeking (a) a declaratory judgment that portions of Chapterms 11, 14, 15, 17, and 34 of Title 2 of the Texas Family Code are unconstitutional, (b) a permanent injunction barring the use of these provisions by the Texas Department of Human Resources, and (c) monetary relief.

2. The three-judge District Court entered a judgment for Respondent on February 23, 1978, which was amended on March 8, 1978. Copies of the memorandum opinion and judgment, and amended judgment are attached to this application.

3. In a motion filed in the District Court, Petititoners requested that the injunction be stayed in order to permit Petitioners to appeal the judgment to this Court. The District Court on March 15, 1978, denied the motion for a stay. Copies of that motion and order are attached to this application.

4. The jurisdiction of this Court to review the case on appeal rests upon 28 U.S.C. § 1253. Jurisdiction to issue the stay requested is granted by Rule 18 of the Supreme Court Rules.

5. *The irreparable injury to Petitioners.*

(a) To prohibit the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse and neglect reports pending appeal would cause irreparable harm to Petitioners unless the stay is granted and would cause

substantial harm to the public interest by inhibiting the State's ability to gather information about and investigate suspected cases of child abuse. Note that the information in question is not disseminated to, or even available to, the general public or anyone else other than certain selected staff of Petitioners who are directly involved in investigating alleged abuse.

(b) To apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard of a preponderance of the evidence currectly set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Petitioners and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect. Such a "higher" standard could also be used to overturn previously valid terminations, and subsequent adoptions, directly contrary to the best interests of the children involved.

(c) To require the appointment of an attorney ad litem for a child in each suit affecting the parent-child relationship in which the State is a party as early as the one-day or 24-hour ex parte hearing would cause irreparable harm to Petitioner. Such appointment is not only impossible as to Petitioners because the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code, it is further inappropriate since such ex parte hearing is nothing more than the equivalent of a temporary restraining order hearing.

(d) To require an emergency hearing to be held under Section 17.02 of Title 2 of the Texas Family Code within one day or 24 hours of seizure of a child in

emergency circumstances, without regard to whether the next day is a scheduled work day, would cause irreparable harm to Petitioners because to do so would always be impossible in some rural areas of the State, and frequently impossible in even urban areas of the State when a district judge was not available within 24 hours or could not hold the one-day or 24-hour hearing on the weekend.

6. Moreover, the Petitioners will be appealing the decision on the basis that the District Court should have abstained under the comity and federalism principles set out in *Younger v. Harris*, 401 U.S 37 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 97 S.Ct. 1211 (1977); and *Trainor v. Hernandez*, 97 S.Ct. 1911 (1977).

7. The abstention doctrine, as well as the Court below's massive interference with the State's judicial processes cause Petitioners to request a stay of the judgment in its entirety. However, should this Court believe a stay of the entire judgment is not appropriate, Petitioners implore the Court to stay the judgment of the District Court in so far as it holds that the Petitioners are bound to return endangered children to potentially life threatening or other physically endangering situations because a state district judge fails to hold an ex parte hearing or appoint an attorney ad litem within one day or 24 hours of seizure, regardless of the availability of such a judge or whether an ex parte hearing is not held literally within 24 hours of the removal of the child(ren) from physically hazardous circumstances.

WHEREFORE, Petitioners pray that the judgment of the United States District Court for the Southern District, Houston Division, or at least the certain above set forth portions of it, be stayed pending appeal and a final determination of the matter by this Court.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

s/s

C. J. CARL
Assistant Attorney General

Attorneys for Petitioners

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AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Application for Stay of Judgment of United States District Court for the Southern District of Texas, Houston Division, has been sent sent to Ms. Gladys R. Goffney, 201 Main Street - Suite 504, Houston, Texas 77002, to Ms. Nell H. Holloway, 201 Main Street - Suite 542, Houston, Texas, 77002, and to Mr. John Carter, Gulf Coast Legal Foundation, Successor to Houston Legal Foundation, 609 Fannin - Suite 1909, Houston, Texas, 77002, by United States Postal Service, Certified, Return Receipt requested, postage prepaid, on this the 23rd day of March, 1978.

s/s
C. J. CARL

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 29, 1978

C. J. Carl, Esquire
Asst. Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Re: Raul Jimenez, et al. v. John Pleasant Sims, et al., A-815

Dear Mr. Carl:

Your application for stay in the above-entitled case has been presented to Mr. Justice Powell, who has endorsed thereon the following:

"Denied
L.F.P.
3/29/78"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By s/s

Peter K. Beck
Assistant Clerk

th

cc: Ms. Gladys R. Goffney
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